No. 336.

Motion to advance

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FILED
NOV 4 1902
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Filed Nov. 4, 1902.

NO. 336

IN THE

Supreme Court of the United States

October Term, 1902.

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR.

VS.

J M. DUTHIE, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

Appeal from the Honorable Circuit Court for the Western District of Texas at El Paso, Texas. Tried before Hon. T. S. Maxey, Circuit Judge on the 9th day of April, 1902, at the April term, 1902, of said Circuit Court at El Paso, Texas.

In the above cause now comes J. M. Duthie, defendant in error

plaintiff below, and respectfully prays and moves this Honorable Supreme Court to advance said cause upon the docket of this Court for the reason that the only question involved in this appeal is the question of jurisdiction of the Court below. And in support of this motion defendant in error submits the following:

Brief statement of the facts:

On the 29th day of August, 1901, defendant in error filed in the Circuit Court for the Western District of Texas his original petition, wherein he alleged among other things. * * * * * * * * * * * "That plaintiff resided in El Paso, in El Paso County, State of Texas, in the Western District of said State, etc." See Record, Bill of Exceptions of plaintiff in error wherein plaintiff's Original petition is set forth in full.

Plaintiff sued for damages for personal injuries to himself and wife while passengers on a train of cars being run and operated over the line of railroad of the Mexican Central Railway Company, Limited, plaintiff in error, defendant below, between El Paso, Texas, and Chihuahua in the Republic of Mexico. On the 19th day of March, 1902, defendant in error, plaintiff below, filed in the trial Court his first amended original petition in lieu of his original petition, but therein made no additional or further allegation or statement of his residence or citizenship than such as were made in his original petition, but simply repeated, as to citizenship of himself and defendant, such allegations in that regard as he had made in his original petition. On the 9th day of April, 1902, defendant filed in said cause, through its attorneys, an answer which consisted:

1st. Of a general demurrer and 2nd General denial.

No special pleas nor special exceptions to the plaintiff's pleading were filed by defendant. On the 9th day of April, 1902, the case was called

for trial and both parties answered ready, defendant's counsel stating to the Court that there was a general exception to the petition which was, by the Court, without argument, overruled. The cause proceeded to trial before a jury whose verdict was returned into Court on the 9th day of April, 1902, in favor of the plaintiff and assessing the damages at $7,500 for injuries to plaintiff and $1,000 for injuries to plaintiff's wife. On the same day judgment was accordingly entered upon said verdict. No further action was had in said cause until the 17th day of April, 1902, when plaintiff, having discovered that the allegations of his original petition as well as his first amended original petition were defective in failing to allege diverse citizenship, that is to say, in failing to allege that he was at the time of institution of suit a citizen of the State of Texas, filed in said Court, the same being still in session, his motion and prayer for leave to amend his pleading so as to supply the necessary allegations of his citizenship in the State of Texas, which motion and prayer for leave to amend was supported by the affidavit of plaintiff setting forth that at the time of the institution of the suit he was a citizen of the State of Texas, etc. This motion coming on to be heard on the 17th day of April, 1902, all of the parties by their counsel being in Court, the same was duly presented and argued to the Court and thereupon the Court made its order giving leave to plaintiff to make the amendment prayed for, without rewriting the amended or original petition and without setting aside the verdict and judgment previously rendered. To this action of the Court in permitting the petition and amended petition to be amended in the regard above stated, defendant through its counsel excepted. And thereafter, on the 18th day of April, 1902, filed in said Court its Bill of Exceptions Nos. 1, 2 and 3 as follows:

"On the ground that the Court was without power to permit an

amendment of the pleadings and alteration of the record without setting aside and holding for naught the verdict and judgment entered herein, but should dismiss said cause for want of jurisdiction." See Record Bill of exceptions of plaintiff in error.

The above objection of plaintiff in error to the Courts permitting the amendment to be made being overruled and the Court having granted the leave to amend and directed the amendment to be made by inserting the necessary allegations to show diverse citizenship without rewriting the pleading, plaintiff in error made the further objection as follows: "And defendant then and there objected to the action of the Court in permitting the plaintiff to insert the said words (to say, "and is a citizen of said State and of the United States of America") in his original and amended petition without requiring plaintiff to rewrite and file a new amendment. See Record Bills of Exception of plaintiff in error.

On April 18th, 1902, plaintiff in error filed in said cause assignments of error as follows:

"1st. The Court erred in overruling defendant's demurrer to plaintiff's petition for the reason that the averments thereof were not sufficient to show that the Court had jurisdiction therein.

2nd. That the Court had no jurisdiction in this cause and should have dismissed the same upon its own motion.

"3rd. That the Court should not have permitted plaintiff to destroy or alter the record by interlining in the pleadings certain jurisdictional averments and the trial Court had no jurisdiction to permit plaintiff to amend his original petition and first amended original petition, by inserting the necessary jurisdictional averments therein, without first setting aside the verdict and judgment rendered herein, and granting a new trial.

"4th. It being no where averred and proved by plaintiff that he was a citizen of the United States of America, or of the State of Texas, prior to the rendition of said judgment, the Court was without jurisdiction herein and should have set aside said verdict and judgment for the reason that it had no jurisdiction at the time of its rendition."

And this defendant in error respectfully shows to this Honorable Court that the object of this motion is to secure an early adjudication and settlement of the jurisdictional question involved. And that justice may be done herein between plaintiff and defendant in error. And for the reason that the question involved has been heretofore passed upon and determined by this Honorable Court in Tremain vs. Hitchcock, 23 Wall, p. 518; Neal vs. Neal, 76 U. S. 590; The United State vs. Bufford, 3 Peters 29.

And by the Honorable Circuit Court of Appeals in Maddox vs Thorn 60 Fed. Rep., 217; Fitchburg R Co. vs. Nichols, 85 Fed. Rep., 869

And for the reason that the contention herein of plaintiff in error is in contravention of Art. 954 of the Revised Statutes of the United States, and has been repeatedly decided adversely to plaintiff in error. Amendments are discretionary with the court below. See Chapman vs. Barney, 129 U. S. 677, and cases there cited; Chirac vs. Renicker, 11 Wheat, 280; Sheshy vs. Manderville, 10, U. S., 6 Cranch 253.

Leigh Clark
Atty. for Defendant
in Error J. M. Duche